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Supreme Court, U.S.
FILED
FEB 26 2004
OFFICE OF THE CLERK

No. 03-6539

IN THE

Supreme Court of the United States

JAY SHAWN JOHNSON,

Petitioner,

vs.

STATE OF CALIFORNIA,

Respondent.

On Writ of Certiorari to the Supreme Court of the State of California

BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether to establish a prima facie case under *Batson* v. *Kentucky*, 476 U. S. 79 (1986), the objector must show that it is more likely than not the other party's peremptory challenges, if unexplained, were based on impermissible group bias?

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF)[1] is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional protection of the accused into balance with the rights of the victim and of society to rapid, efficient, and reliable determination of guilt and swift execution of punishment.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is a significant regulation of our justice system. Peremptory challenges are essential to the impartiality of juries, to the fairness of trials, and to avoiding needless retrials. While *Batson* serves the

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1. This brief was written entirely by counsel for *amicus*, as listed on the cover, and not by counsel for any party. No outside contributions were made to the preparation or submission of this brief.

   Both parties have given written consent to the filing of this brief.

important goal of limiting discrimination in the jury system, it can place significant restraints on the exercise of peremptory challenges. An overzealous expansion of *Batson* threatens to fatally compromise the ability of litigants to remove biased jurors and obtain a jury that both parties accept. Requiring the proponent of a *Batson* motion to prove discrimination by a preponderance of the evidence before opposing counsel can be made to justify the peremptory challenges prevents *Batson* from being used as a device to thwart valid, nondiscriminatory challenges, while preserving *Batson*'s integrity. Overturning this rule will cause serious harm to peremptory challenges and the administration of justice, which would be contrary to the interests of justice and society that the CJLF was formed to protect.

SUMMARY OF FACTS AND CASE

The defendant, Jay Shawn Johnson, was convicted of the second-degree murder of his girlfriend's 19-month-old daughter and of assault resulting in the death of a child younger than eight. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1306-1307, 71 P. 3d 270, 272 (2003); Cal. Penal Code §§ 187, 273ab. Twelve peremptory challenges were exercised by the district attorney, with three used to strike all of the African-Americans from the panel. See *id.*, at 1307, 71 P. 3d, at 272. After the second African-American venire member was challenged, the defense "made a '*Wheeler* motion.' " See *ibid.* This motion refers to *People* v. *Wheeler*, 22 Cal. 3d 258, 583 P. 2d 748 (1978), which held that the California Constitution prevented peremptory challenges motivated by group bias. See *id.*, at 276-277, 583 P. 2d, at 761-762. *Wheeler* preceded this Court's decision invalidating race-based peremptory challenges on equal protection grounds. See *Batson* v. *Kentucky*, 476 U. S. 79, 82, n. 1 (1986).

Defense counsel stated that the "motion '[m]ore specifically . . . concerns [S.E.], the last individual who was eliminated by

the People,' " and argued that the prosecution had no apparent reason for striking her other than her race. He made no argument regarding the first juror. See 30 Cal. 4th, at 1307, 71 P. 3d, at 272. The trial

> "court responded that 'based on the record that's been made, [it] would find that there's not been shown a strong likelihood that the exercise of the peremptory challenges were based upon a group rather than an individual basis. The Court has to start from the position of a premise that the exercises of the peremptory challenges were based on constitutional grounds.' The court also told the district attorney, however, that 'we are very close.' " *Id.*, at 1307, 71 P. 3d, at 272-273.

The defendant renewed his *Wheeler* motion after the third African-American venire member was removed by peremptory challenge. See *id.*, at 1307, 71 P. 3d, at 273. This time the motion was based on the fact that the district attorney's peremptory challenges had removed all African-Americans from the panel. It was denied in a detailed ruling by the trial court. See *ibid.* Considering the last challenged juror, the trial court stated that it had

> "concerns with regard to her qualifications in this matter based upon her answers on the questionnaire; specifically, the Court had noted that she had a sister who had had drug charges, although her answers in follow-up verbally were such that the Court would not have found that the issues were such to lead to a challenge for cause. May be sufficient to justify a peremptory challenge by the People. [¶] Also, with regard to her answers generally on the questionnaire itself, there was an indication that she had difficulty understanding some of the issues, and specifically, her last response which was somewhat rambling on the questionnaire indicated that she herself felt that she had difficulty understanding things. Again, her verbal responses here in court were such that I would not have granted a challenge for cause on that basis, but the Court felt that the answers

on the questionnaire were sufficient that they certainly would have justified a peremptory challenge by either side, frankly, based upon the concerns about her ability to understand the proceedings." *Ibid.*

The trial court further noted that it also had concerns about S.E., the second challenged African-American panel member. Based on her *voir dire* answers, the court would not grant a challenge for cause, but it understood that either side would be justified in using a peremptory challenge against her due to her emotional nature. See *id.*, at 1307-1308, 71 P. 3d, at 273.

" 'In summary,' the [trial] court said 'with regard to the jurors, while the Court would not grant the challenges for cause, there were answers . . . at least on the questionnaires themselves such that the Court felt that there was sufficient basis for the peremptory challenge. [¶] Even with the addition of [the most recent challenge], the Court will not find a prima facie case.' " *Id.*, at 1308, 71 P. 3d, at 273.

The Court of Appeal reversed, finding that *Wheeler*'s " 'strong likelihood' " standard violated *Batson*. See *ibid.* Comparing the *voir dire* answers given by the challenged jurors to the answer of the unchallenged jurors, the intermediate appellate court found "that 'a prima facie case of group bias was established and the judgment must therefore be reversed.' " *Ibid.*

The California Supreme Court reversed the appellate court's judgment and reinstated the conviction. California's high court addressed whether *Wheeler*'s " 'strong likelihood' " standard was unconstitutionally higher than the *Batson* standard for proving a prima facie case of discrimination. It extensively analyzed the *Wheeler* and *Batson* standards, see *id.*, at 1309-1312, 71 P. 3d, at 274-276, and concluded that although they used different language, the *Wheeler* and *Batson* standards were the same. See *id.*, at 1318, 71 P. 3d, at 280. This "means that to state a prima facie case, the objector must show that it is more likely than not the other party's peremptory challenges, if

unexplained, were based on impermissible group bias." *Id.*, at 1318, 71 P. 3d, at 280. Therefore, the trial court correctly relied on *Wheeler*. See *ibid.* This Court granted certiorari on December 1, 2003, restating the question presented. See *supra*, at i.

SUMMARY OF ARGUMENT

Any interpretation of *Batson* v. *Kentucky*, 476 U. S. 79 (1986) should take account of the interests influenced by that decision. Rather than creating a substantive right, *Batson* developed a procedure for addressing claims of discriminatory peremptory challenges. This procedure, although important, can be interpreted flexibly without doing violence to the underlying right to be free from discrimination in jury selection.

The procedure for determining a particular constitutional claim is often set with an eye towards policy and various competing interests. Examples are found in this Court's decisions establishing the preponderance standard for determining the voluntariness of confessions and the validity of waivers under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). *Batson*'s rule primarily serves the interests of society and the excluded juror. It is possible for a litigant to experience *Batson* error at trial, and still have a fair trial in front of an impartial jury. This use of the *Batson* motion as a proxy for societal interests reinforces the need to minimize *Batson*'s costs to society while preserving its benefits.

Peremptory challenges are essential to fair and effective trials. Its primary function is to allow the parties to remove the most biased individuals from the jury. Challenges for cause are too restrictive to weed out any but a handful of biased jurors. Peremptory challenges allow the parties to weed out more biased jurors, and to question aggressively on *voir dire* without the fear of leaving an offended juror on the jury. Removing biased jurors from the petit jury improves the fairness of juries and diminishes the risk of hung juries in criminal cases. Peremptory challenges also give verdicts legitimacy by allow-

ing the parties to shape the jury to their liking. The peremptory challenge has long been considered essential to the justice system and remains so even after *Batson*.

Peremptory challenges are vulnerable to excessive scrutiny. Discerning bias is not a science, and peremptory challenges are often made for reasons that cannot be readily articulated. *Batson*, by requiring counsel to explain the unexplainable, places a substantial burden on the exercise of such challenges. A nondiscriminatory peremptory challenge that is based upon a hunch or a similarly difficult to explain rationale runs a real risk of being struck down under *Batson*.

Batson's influence over peremptory challenges is much greater now than when it was decided. Its rule now covers any peremptory challenge made at any trial. This pervasive regulation has become a tactic for litigators to use to embarrass opposing counsel or to frustrate attempts to remove a juror biased in their favor.

California's approach to *Batson* reflects the right balance between the decision's costs and benefits. It minimizes *Batson*'s burden on peremptory challenges, while preserving the rule against jury discrimination. Any lowering of the California standard will only invite more tactical abuses of the *Batson* rule and further limit the ability of parties to weed out biased jurors.

This reading of *Batson* is consistent with the language of *Batson* and cases interpreting it. Since the proponent's case is only made at the first stage of the *Batson* hearing, it is only sensible to require the proponent to carry its entire burden at the first stage. This analysis is reinforced by the fact that establishing a prima facie case under *Batson* shifts the burden of proof to the opponent of the motion. *Batson*'s use of prima facie case is also consistent with the first definition of this term found in Wigmore's treatise. In Wigmore's first definition of prima facie case, the moving party proves the case by a substantial body of evidence, which shifts the burden to the opposing party

to produce evidence to rebut the claim. This describes *Batson* and the California procedure implementing *Batson*.

ARGUMENT

I. Any interpretation of the *Batson* test should take account of the interests influenced by that decision.

Batson v. *Kentucky*, 476 U. S. 79 (1986) is primarily a procedural decision. It established a means of proving equal protection claims against peremptory challenges. This Court first noted that the prosecution's exercise of peremptory challenges might violate equal protection in *Swain* v. *Alabama*, 380 U. S. 202, 224 (1965). *Swain* set a high standard for proving discriminatory peremptory challenges. An inference of purposeful discrimination could be found on evidence that the prosecutor

> "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or the victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries . . . ." *Id.*, at 223.

While Swain demonstrated that the prosecution used peremptory challenges to remove all African-Americans from his jury, he had no evidence regarding the exercise of peremptory challenges in other cases. See *id.*, at 224-226. Therefore, he could not win his jury discrimination claim because he failed to carry his burden of proof. See *id.*, at 226. The *Batson* decision was a reexamination of *Swain*'s evidentiary burden on the party alleging discriminatory peremptory challenges. See 476 U. S., at 82.

This Court determined that the standard in *Swain* created a "crippling burden of proof" on the party attacking the peremptory challenge that effectively nullified the prohibition against discriminatory peremptory challenges. See *id.*, at 92. *Batson*

rejected the *Swain* standard for proving a prima facie case of discrimination. See *id.*, at 93. The defendant could now establish a prima facie case "solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial." *Id.*, at 96. The defendant must show that he or she belongs to a "cognizable racial group, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race." *Ibid.* (citation omitted). The defense can rely on the fact "that peremptory challenges constitute a jury selection practice that permits, 'those to discriminate who are of a mind to discriminate.'" *Ibid.* (quoting *Avery* v. *Georgia*, 345 U. S. 559, 562 (1953)). In addition, the defendant may use any other relevant circumstances to "raise an inference" of discrimination. See *ibid.*

The *Batson* Court next provided the procedural framework for resolving claims that peremptory challenges violated equal protection. It established a three-part test for determining whether these claims were valid. First the defendant must establish a prima facie case of discrimination, which then shifts the burden to "the State to come forward with a neutral explanation" for the peremptory challenges. See *id.*, at 97. If a neutral explanation is offered, "[t]he trial court then will have the duty to determine if the defendant has established purposeful discrimination." *Id.*, at 98.

This case concerns the first part of the *Batson* test, the standard of proof for a prima facie case. This is not part of the substantive guarantee against discrimination in peremptory challenges. It deals with the means of resolving these claims. As a procedure for determining constitutional claims, *Batson* should reflect the constitutional policies that it serves, while minimizing the costs and maximizing the benefits to society. *Batson*'s evidentiary rule, while important to securing the substantive guarantee of equal protection for jurors, can be interpreted flexibly without doing violence to the underlying constitutional right to be free from discrimination in jury selection.

The procedure for determining a particular constitutional claim is often set with an eye towards policy and various competing interests. One example is the burden of proof for proving that the suspect made a valid waiver under *Miranda* v. *Arizona*, 384 U. S. 436 (1966). This Court has stated that the government had a "heavy" burden in proving a valid *Miranda* waiver, without specifying what would satisfy that burden. See *id.*, at 475; *Tague* v. *Louisiana*, 444 U. S. 469, 470-471 (1980) (*per curiam*); *North Carolina* v. *Butler*, 441 U. S. 369, 373 (1979). Nothing more was said about the procedure for determining a *Miranda* waiver until *Colorado* v. *Connelly*, 479 U. S. 157 (1986), which set the evidentiary standard.

Connelly addressed a Colorado Supreme Court opinion holding that the state's burden of proving a valid *Miranda* waiver could only be discharged through clear and convincing evidence. See *id.*, at 167. While *Miranda* did describe the burden of proving a waiver as heavy, this did not mandate a clear and convincing evidence standard. See *id.*, at 167-168. Analysis was driven by what standard of proof protected the *Miranda* rule while serving society's interests in admitting voluntary confessions.

Connelly adopted the standard for determining the voluntariness of confessions found in *Lego* v. *Twomey*, 404 U. S. 477 (1972). *Lego*'s holding that the prosecution must prove the voluntariness of a confession by a preponderance of the evidence, see *id.*, at 489, was driven by policy. Although *Jackson* v. *Denno*, 378 U. S. 368 (1964) noted that there may be some "relationship between the involuntariness of a confession and its unreliability," *Lego*, *supra*, at 484, the confession's reliability was irrelevant to the voluntariness hearing. See *id.*, at 484-485, n. 12. Thus *Jackson* was not based on a fear that juries would admit unreliable confessions "and arrive at erroneous determinations of guilt or innocence." See *id.*, at 484-485. *Jackson* was only intended to prevent defendants from being "compelled to condemn himself by his own utterances." *Id.*, at 485. Since the voluntariness hearing "has

nothing whatever to do with improving the reliability of jury verdicts, we cannot accept the charge that judging the admissibility of a confession by a preponderance of the evidence undermines the mandate of *In re Winship*, 397 U. S. 358 (1970)." *Id.*, at 486.

The policies behind the exclusionary rule also played a role in the *Lego* decision. The defendant claimed that even if *Winship* did not mandate using the reasonable doubt standard for determining a confession's voluntariness, that standard was still necessary "in order to give adequate protection to those values that exclusionary rules are designed to serve." 404 U. S., at 487. Since exclusionary rules like *Miranda* and *Mapp* v. *Ohio*, 367 U. S. 643 (1961) require the exclusion of evidence "for reasons wholly apart from enhancing the reliability of verdicts," it was argued that these same values mandated a reasonable doubt standard in the context of the voluntariness of confessions. See 404 U. S., at 488. Although this argument was "straightforward and has appeal," *ibid.*, *Lego* rejected it, since acceptance would disrupt the exclusionary rule's balance of interests.

Experience showed that the reasonable doubt standard was unnecessary to protect the exclusionary rule. The preponderance standard was used for many years in determining the admissibility of confessions and the products of searches and seizures without undermining either exclusionary rule. See *ibid.* New barriers to admitting "truthful and probative evidence" should not be raised without good cause. See *ibid.* Any extra deterrent to lawless conduct from raising the burden of proof would not outweigh society's interests "in placing probative evidence before juries for the purpose of arriving at truthful decisions about guilt or innocence." *Id.*, at 489. Since the cost of imposing the reasonable doubt standard exceeded any benefits, there was no need to require more than a preponderance.

Connelly adopted this approach to the context of the *Miranda* waiver. Since the *Miranda* rule was an "auxiliary" to

the voluntariness requirement for confessions, *Miranda* waivers should not be subject to a higher evidentiary standard. See *Connelly*, 479 U. S., at 169. Most importantly, the balance of interests reflected in the exclusionary rule would be disrupted by imposing additional barriers to the admissibility of evidence. See *ibid.* Therefore *Lego* was reaffirmed and the preponderance standard applied to the *Miranda* waiver issue. See *id.*, at 168.

Exclusionary rules such as *Miranda* and *Mapp* operate at considerable cost to society. They can frustrate public safety and undermine the accuracy of trials by suppressing reliable evidence simply because the "constable has blundered." See *People* v. *Defore*, 150 N. E. 585, 587 (N.Y. 1926); *Nix* v. *Williams*, 467 U. S. 431, 447-448 (1984). While they serve a constitutionally necessary purpose, expanding the scope of exclusionary rules tips the balance of interests too far from society. *Lego* and *Connelly* refused to adopt a more stringent evidentiary standard in order to avoid this type of disruption. *Batson* involves similar balancing. It serves the important goal of preventing jury discrimination, but at a high cost in burdening peremptory challenges. Any procedure for resolving *Batson* claims should balance these interests.

In this sense, *Batson*'s rule parallels exclusionary rules such as *Mapp* and *Miranda*. Those two decisions can give a windfall to the defendant asserting either right by suppressing valid evidence in order to protect other constitutional interests. *Batson* allows a litigant to gain the benefit of its rule although the litigant is not its primary beneficiary. This allows *Batson* to create a windfall for some litigants.

While the Equal Protection Clause prohibits discrimination that keeps people off the jury because of their race or gender, the Constitution does not require the petit jury to actually represent a fair cross-section of the community. See *Holland* v. *Illinois*, 493 U. S. 474, 478 (1990). While it is essential that no one is excluded because of race or gender, the fact that a petit jury lacks members of a particular race or gender does not

rob it of its impartiality. *Batson* is premised on the idea that group membership is irrelevant to a juror's impartiality. See *Batson*, *supra*, at 87. Therefore, a jury tainted by racially motivated peremptory challenges can still be impartial. See *Holland*, *supra*, at 487-488. While discriminatory peremptory challenges do harm the relevant party, see *Batson*, 476 U. S., at 86, it is difficult to quantify this damage. Although discrimination harms the party in some way, a fair trial is more important to the party than jury discrimination.

Batson more readily serves society and the excluded juror. Being excluded from jury service simply because of race or gender discriminates against the excluded juror. See *id.*, at 87. Exclusion from the jury due to race or gender robs the average person of his or her "most significant opportunity to participate in the democratic process" outside of voting. See *Powers* v. *Ohio*, 499 U. S. 400, 406-407 (1991). The high cost of litigation prevents the juror from personally protecting his or her right to remain on the jury through a civil rights action. See *Georgia* v. *McCollum*, 505 U. S. 42, 56 (1992). *Batson* allows the parties to protect the jurors' equal protection rights, see *ibid.*, just as the Fourth Amendment exclusionary rule allows criminal defendants to protect Fourth Amendment rights that could not be protected through other remedies. See *Mapp*, 367 U. S., 652-653.

The most important interests served by *Batson* are society's. Jury discrimination strikes at the integrity of the justice system. It "undermine[s] public confidence in the fairness of our system of justice." See *Batson*, 476 U. S., at 87. Discrimination in jury selection also stimulates the prejudice upon which it is based. See *id.*, at 87-88. In racially-charged cases, jury discrimination can undermine public confidence in verdicts with disastrous results. See *McCollum*, 505 U. S., at 49-50. *Batson* allows the litigants to serve as proxies for society in order to limit this social harm.

This use of litigants as proxies for other interests creates windfalls for some parties. If the trial court grants a *Batson*

motion, the typical remedy is either to disallow the peremptory challenge and place the challenged person on the jury, or to dismiss the entire venire. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 335 (2d ed. 1999). If the trial court reinstates the challenged juror, then the party making the *Batson* claim may gain a small advantage, since the juror may feel some hostility to the party that made the unsuccessful peremptory challenge. *Batson*'s real windfall occurs on appeal. If a *Batson* claim is successfully raised on appeal, then the party raising the claim gets a new trial even though the case was tried by an impartial jury.[2] While *Batson* error may compromise the integrity of the verdict, particularly in racially-charged cases, in many cases it will not. Unfortunately, there is no way for determining whether *Batson* error has in fact undermined the verdict. This problem is compounded by the fact that *Batson* error is effectively *per se* reversible. This Court has never used harmless error analysis when addressing *Batson* violations, see Muller, Solving the *Batson* Paradox: Harmless Error, Jury Representation, and the Sixth Amendment, 106 Yale L. J. 93, 117 (1996), and every federal circuit that has addressed the issue has held that *Batson* error leads to automatic reversal. See Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L. Q. 713, 791 (1999).

Automatic reversal for an error that may have no effect on the fairness of the trial is justified by the social interests that *Batson* serves. Jury discrimination is a real threat to jurors and society, and *Batson* provides the only realistic means of limiting this harm. However, any interpretation of *Batson* must be careful to control its social costs.

The decision to depart from *Swain* and lower the evidentiary burden of proving racially discriminatory peremptory

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2. This argument does not apply to *Batson* violations by criminal defendants, since the prosecution cannot appeal acquittals. See *Smalis* v. *Pennsylvania*, 476 U. S. 140, 145-146 (1986).

challenges was based on policy considerations. While the *Batson* Court understood the importance of peremptory challenges to the fairness and justice of trials, see 476 U. S., at 98-99, given *Swain*'s inability to enforce the equal protection prohibition against jury discrimination, it was necessary to shift the burden away from the party attacking the allegedly discriminatory challenge. That decision reflected a balancing of interests. The new evidentiary standard would not compromise peremptory challenges, while enhancing public respect for the justice system and strengthening the rule of law. Any interpretation of *Batson* procedure should keep its balance of interests in mind.

II. Peremptory challenges are essential to effective and fair trials.

While this Court first invalidated racial discrimination in jury selection in *Strauder* v. *West Virginia*, 100 U. S. 303, 310 (1880), effective regulation of discriminatory peremptory challenges did not happen until *Batson* v. *Kentucky*, 476 U. S. 79 (1986). This Court's initial reluctance to involve the Constitution in peremptory challenges reflects the importance and delicacy of this procedure. Although there is no constitutional right to peremptory challenges, see *Stilson* v. *United States*, 250 U. S. 583, 586 (1919), it is difficult to imagine a trial that is fair without peremptory challenges. *Batson*'s balance must weigh the vital interests served by peremptory challenges.

"The peremptory challenge has very old credentials." *Swain* v. *Alabama*, 380 U. S. 202, 212 (1965). Granting peremptory challenges to the accused in capital cases was described as "a provision full of that tenderness and humanity to prisoners, for which our English laws are justly famous." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). The prosecution also had peremptory challenges or a similar procedure at the common law. See *Swain*, *supra*, at 213. From

its common law roots, peremptory challenges have spread to every jurisdiction. See 5 W. LaFave, J. Israel, & N. King, Criminal Procedure § 22.3(d), p. 320 (2d ed. 1999).

Peremptory challenges serve several necessary functions. One important feature is compensating for the very restrictive rules concerning challenges for-cause. Challenges for-cause "permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality." *Swain*, *supra*, 380 U. S., at 220. While the grounds vary among jurisdictions they

> "are typically stated in terms of specific situations: that the person lacks the legal qualifications for jury service; that he has previously served as a juror on some related matter . . . ; that he has served or will serve as a witness regarding the subject matter of the pending trial; or that he is related in some degree to the defendant or others directly involved in the case." 5 W. LaFave, *et al.*, *supra*, § 22.3(c), at 305-306 (footnotes omitted).

Usually the rules also contain a catch-all provision, allowing courts to exclude for cause jurors who have already formed a sufficiently strong opinion of the case that they cannot act as an unbiased juror. See *ibid.* This general provision requires much more bias than knowledge of the facts of the case and forming some opinion from these facts. The Constitution only requires that "the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." See *Irvin* v. *Dowd*, 366 U. S. 717, 723 (1961). If the trial court believes that the potential juror can set aside any previously formed opinions of the case, then it can deny a for-cause challenge.

Peremptory challenges help to preserve the right to an impartial jury, by allowing the parties to remove biased jurors who are not weeded out by the narrow for-cause challenge. It is difficult to remove biased jurors through a for-cause challenge. Prospective jurors are presumed to be impartial, see *ibid.*, and trial courts are reluctant to grant for-cause challenges

under the general bias provision. "Such challenges are often denied—even when common sense indicates that there *must* be bias—as long as the potential juror says that she would decide the case 'only on the evidence presented' and would not be influenced by any other factor." Babcock, Voir Dire: Preserving "Its Wonderful Power", 27 Stan. L. Rev. 545, 549-550 (1975) (emphasis in original). Indeed, some jurors will "evade or misconstrue, unconsciously or deliberately, general voir dire questions in order to avoid answering and being struck." *Id.*, at 547. Thus, potential jurors are struck for cause only when the bias is "blatant." Pizzi, *Batson* v. *Kentucky*: Curing the Disease But Killing the Patient, 1987 S. Ct. Rev. 97, 126, n. 186. Improperly denied for-cause challenges are almost unreviewable.

> "It must be made clearly to appear that upon the evidence the court ought to have found the juror had formed such an opinion that he could not in law be deemed impartial. The case must be one in which it is manifest the law left nothing to the 'conscience or discretion' of the court." *Reynolds* v. *United States*, 98 U. S. 145, 156 (1879).

Peremptory challenges allow parties to remove biased jurors who should have been removed for cause but were not, see *United States* v. *Martinez-Salazar*, 528 U. S. 304, 319 (2000) (Scalia, J., concurring in the judgment), or those where the case for bias is close, like the present case. See *supra*, at 3-4.

Peremptory challenges also helps find jurors that should be removed for cause. Aggressive questioning of potential jurors is often necessary to find bias. This questioning can offend the juror even if he or she is not removed for cause. The peremptory challenge allows a party to question aggressively with the fear of leaving a hostile juror on the jury. See *Swain*, 380 U. S., at 220; *United States* v. *Annigoni*, 96 F. 3d 1132, 1137-1138 (CA9 1996) (en banc).

The question of a juror's bias is rarely answered by a simple yes or no. Bias exists on a continuum. Those jurors at the very

extreme end, who have some personal relationship with the case or are blatantly biased towards or against a party, are removed for cause. Those with less extreme, but still substantial bias will be removed by peremptory challenges. This has important benefits for the efficiency, justice, and representative nature of the jury.

Extremist jurors are a substantial threat to the integrity of verdicts in criminal cases. Since unanimity or near unanimity is necessary for a verdict in criminal cases, *Apodaca* v. *Oregon*, 406 U. S. 404, 411 (1972) (10-2 verdict does not violate the Sixth Amendment); *Burch* v. *Louisiana*, 441 U. S. 130, 139 (1979) (unanimous jury required when six jurors), a few substantially biased jurors can hold out in spite of strong evidence and hang a jury. Improperly hung juries give no legitimate benefit to anyone. Retrial is expensive, time-consuming, and risky. It is bad enough to force society to bear these costs, but much worse for a criminal defendant to bear the costs of an unnecessary retrial. While there may be no constitutional right to peremptory challenges, they are important to preserving accuracy of verdicts in criminal cases.

The defense and prosecution are entitled to an impartial jury, see *Holland* v. *Illinois*, 493 U. S. 474, 483-484 (1990), as are civil litigants. In addition to avoiding hung juries, removing irredeemably biased jurors makes juries fairer and more impartial. "Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides' " assuring a representative and unbiased jury. *Id.*, at 484 (quoting *Swain*, 380 U. S., at 219). It is therefore understandable that "[t]he constitutional phrase 'impartial jury' takes its content from this unbroken tradition" of peremptory challenges. *Id.*, at 481. An impartial jury is not one in which no juror has any bias, as that is impossible. It is one in which each juror "can lay aside his opinion and render a verdict based on the evidence . . . ." *Patton* v. *Yount*, 467 U. S. 1025, 1037, n. 12 (1984). By removing from the jury those who either party

feels cannot meet this standard, peremptory challenges are "essential to the fairness of trial by jury." *Lewis* v. *United States*, 146 U. S. 370, 376 (1892).

Peremptory challenges are also important to establishing a belief in the justice of our system and the propriety of jury verdicts. The challenges allow the parties to shape the jury to their liking. See Henning, Prosecutorial Misconduct and Constitutional Remedies, 77 Wash. U. L. Q. 713, 780-781 (1999). Assuring both parties that they are being tried by an impartial factfinder gives the verdict legitimacy.

> "[T]he peremptory challenge teaches the litigant, and through him the community, that the jury is a good and proper mode for deciding matters and that its decision should be followed because in a real sense the jury belongs to the litigant: he chooses it. Without giving any reason or meeting any legal test, he may dismiss from 'his' jury those he fears or hates the most, so that he is left with 'a good opinion of the jury, the want of which might totally disconcert him; the law wills not that he should be tried by any one man against whom he has conceived a prejudice even without being able to assign a reason for such dislike.' The ideal that the peremptory serves is that the jury not only should be fair and impartial, but should seem to be so to those whose fortunes are at issue." Babcock, 27 Stan. L. Rev., at 552 (footnotes omitted) (quoting Blackstone).

As Justice Frankfurter noted, "The appearance of impartiality is an essential manifestation of its reality." *Dennis* v. *United States*, 339 U. S. 162, 182 (1950) (dissenting opinion). A majority of this Court also noted the importance of the peremptory challenge to preserving the perception and the reality that the trial is fair. See *Swain* v. *Alabama*, 380 U. S., at 219. Although *Swain* was partially invalidated by *Batson*, this does not deny the importance of the peremptory challenge or the relevance of this analysis. By setting a standard of proof that could not be met, see *Batson*, 476 U. S., at 92-93, *Swain* went too far in setting the balance between equal protection and peremptory challenges. Even after *Batson*, though, peremptory challenges are still important to our justice system. See *id.*, at 98-99; *Holland*, 493 U. S., at 484 (citing *Swain*).

"The right to challenge a given number of jurors without showing cause is one of the most important of the rights secured to the accused." *Pointer* v. *United States*, 151 U. S. 396, 408 (1894) (Harlan, J.). It was recognized by the common law as a means of insuring an impartial trial. See *ibid.* "Any system for the empanelling of a jury that prevents or embarrasses the full, unrestricted exercise by the accused of that right, must be condemned." *Id.*, at 408. While peremptory challenges must be regulated under *Batson*, it is important to keep in mind their considerable benefit to litigants and society.

III. Peremptory challenges are vulnerable to excessive scrutiny.

The peremptory challenge has a unique and fragile nature. Unlike almost every other aspect of the law, the peremptory challenge does not have to be justified, or even logical. This lack of justification is no accident. Instead, it is integral to the peremptory challenge and its role in protecting the fairness and integrity of trials. *Batson* v. *Kentucky*, 476 U. S. 79 (1986), by requiring attorneys to give reasons for that which needs no reason, threatens to turn peremptory challenges into diluted for-cause challenges if expanded too far.

From their beginning, peremptory challenges were designed to need no justification. At the common law they were labeled "an arbitrary and capricious species of challenge . . . ." 4 W. Blackstone, Commentaries 346 (1st ed. 1769). Similarly, Coke describes it as the right to "peremptorily challenge 'on his own dislike' without showing any cause; [the defendant] may exercise that right without reason or for no reason, arbitrarily and capriciously." *Pointer* v. *United States*, 151

U. S. 396, 408 (1894) (quoting 1 E. Coke, Institutes 156b (19th ed. 1832)).

The peremptory challenge's nature has not changed. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain* v. *Alabama*, 380 U. S. 202, 220 (1965). Jury selection is more art than science, and the psychology of bias is at best inexact. While *voir dire* can help provide a solid foundation for uncovering bias in some cases, effective use of the peremptory challenge often hinges on rationales that cannot be explained with any precision. "Indeed, often a reason for it cannot be stated, for a trial lawyer's judgments about a juror's sympathies are sometimes based on experienced hunches and educated guesses, derived from a juror's responses at voir dire or a juror's ' "bare looks and gestures." ' " *J. E. B.* v. *Alabama ex rel. T. B.*, 511 U. S. 127, 148 (1994) (O'Connor, J., concurring). The fact that a challenge is based on a hunch does not mean that it is wrong. Nonverbal cues can reveal a juror's attitude as much as verbal responses. See V. Starr & M. McCormick, Jury Selection 445-446 (3d ed. 2001). "Our belief that experienced lawyers will often correctly intuit which jurors are likely to be the least sympathetic, and our understanding that the lawyer will often be unable to explain the intuition, are the very reason we cherish the peremptory challenge." *J. E. B.*, 511 U. S., at 148 (O'Connor, J., concurring).

Peremptory challenges are vulnerable to explanation. Since it is their nature not to have readily articulated reasons for their exercise, requiring too may reasons may undercut peremptory challenges, destroying their utility. "But, as we add, layer by layer, additional constitutional restraints on the use of the peremptory, we force lawyers to articulate what we know is often unarticulable." *Ibid.* (O'Connor, J., concurring). *Batson*, by requiring counsel to explain the unexplainable, burdens peremptory challenges.

The question presented in this case is how much will *Batson* burden peremptory challenges. *Batson* itself did not conclusively determine this because the decision was so open-ended. Justice White's statement that "[m]uch litigation will be required to spell out the contours of the Court's equal protection holding today . . . ," *Batson*, 476 U. S., at 102 (White, J., concurring), was prophetic, as *Batson* has led to a series of interpreting decisions. Most of them have expanded *Batson*'s regulation of peremptory challenges, see, *e.g.*, *Powers* v. *Ohio*, 499 U. S. 400, 402 (1991) (litigant does not have to be of the same race as the excluded juror to raise a *Batson* claim); *Edmonson* v. *Leesville Concrete Co.*, 500 U. S. 614, 616 (1991) (*Batson* applies to civil cases); *Georgia* v. *McCollum*, 505 U. S. 42, 59 (1992) (*Batson* applies to criminal defendants); *J.E.B.*, *supra* (*Batson* applies to gender-based peremptory challenges), although a few have not. See, *e.g.*, *Hernandez* v. *New York*, 500 U. S. 352, 361 (1991) (plurality) (upholding prosecution peremptory challenges against bilingual venire members believed to be unable to accept the official translation); *Purkett* v. *Elem*, 514 U. S. 765, 768 (1995) (*per curiam*) (justification for challenge need not be even minimally persuasive to satisfy *Batson*'s second prong). Since *Batson* applies to all litigants and one does not have to be a member of the same group as the excluded juror, it now looms over every peremptory challenge made, making it much more invasive than when it was decided.

This fact may help to explain *Purkett*. Its holding, that *Batson*'s second step "does not demand an explanation that is persuasive, or even plausible," 514 U. S., at 768, helps keep *Batson* from eviscerating the peremptory challenge. Yet *Batson* remains still a significant burden on peremptories. Requiring any justification, even an implausible one, is still inconsistent with the idea behind peremptory challenges. Also, while *Batson*'s second prong may be satisfied by a facially implausible justification, such a justification is not likely to save a peremptory challenge from a *Batson* motion.

At *Batson*'s third stage, in which the trial court determines whether the peremptory challenges were in fact discriminatory, see *Batson*, 476 U. S., at 98, "implausible or fantastic justifications may (*and probably will*) be found to be pretexts for purposeful discrimination." *Purkett*, 514 U. S., at 768 (emphasis added). *Purkett* has not reduced *Batson* to a formality. "Under *Purkett*, trial courts must still decide whether a proffered explanation is a subterfuge, and this can be a basis for appeal and reversal." *United States* v. *Annigoni*, 96 F. 3d 1132, 1150 (CA9 1996) (en banc) (Kozinski, J., dissenting).

Purkett simply reaffirms the importance of the trial court in resolving *Batson* claims. Since a bare record cannot convey the tone of voice, body language, or other nuances that will inform the trial court's decision, *Batson* claims are reviewed with "great deference" on appeal. *Batson*, 476 U. S., at 98, n. 21. The Court of Appeals in *Purkett* had held that the trial court must find that the explanation for the peremptories is plausible before a trial court can deny a *Batson* motion. See 514 U. S., at 767-768. This effectively combined *Batson*'s second and third steps. See *id.*, at 768. This holding undercut the deference accorded the trial court's findings under *Batson*. See *id.*, at 769.

Purkett does not substantially diminish *Batson*'s reach over peremptory challenges. While it is proper to leave most of the *Batson* inquiry to the trial court, this creates the potential for great variation in *Batson*'s enforcement. See Pizzi, *Batson* v. *Kentucky*: Curing the Disease But Killing the Patient, 1987 S. Ct. Rev. 97, 137. Since granting a *Batson* motion is even less likely to be reversed on appeal than a denial,[3] trial courts retain considerable authority of peremptory challenges after *Purkett*. Even after *Purkett*, a litigant facing a *Batson* motion

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3. For example, double jeopardy would prevent the prosecution's appeal of a successful *Batson* motion after a verdict and judgment have been rendered in a criminal case, see *supra* note 2, while an interlocutory appeal in the middle of jury selection is impractical.

without an adequate justification for the contested peremptory challenge faces a genuine risk of losing the right to that peremptory challenge.

The threat of a *Batson* motion inevitably colors the jury selection process. This is mostly worthwhile, since racial and sexual discrimination has no legitimate place in jury selection. By giving litigants incentives to avoid jury discrimination, *Batson* appropriately serves society and the equal protection interests embodied in the Fourteenth Amendment. Counsel are aware of *Batson*'s importance, and it is a major consideration in jury selection. "*Batson* challenges have become commonplace in our courtrooms; rare is the trial where one side or the other does not rattle a *Batson* sabre." *Annigoni*, 96 F. 3d, at 1150 (Kozinski, J., dissenting). While it is good for courts and counsel to pay heed to *Batson*'s prohibition against jury discrimination, overzealous application of the decision needlessly diminishes peremptory challenges.

A significant risk of *Batson* is the elimination of challenges based on more ephemeral justifications such as hunches or a dislike of a particular venire member. Raising a *Batson* claim against a challenge based on a hunch creates significant problems for the justice system. The counsel that made the challenge is placed in the unenviable position of articulating reasons for a type of decision that by definition is not capable of justification through formal reasoning. Valid, nondiscriminatory "neutral" reasons may not be able to be articulated even though they exist.

> "In the world of peremptory challenges, where it is acceptable to challenge jurors based on hunches, body language, pop psychology, political preferences, and economic status, and where lawyers are encouraged to strike jurors on the basis of the subjective feelings and impulses, there is no content to the notion of a 'neutral explanation'" Pizzi, 1987 S. Ct. Rev., at 135 (footnote omitted).

This leads to several uniformly difficult alternatives. If counsel truthfully says that the peremptory challenge is based on a hunch, then the burden shifts to the trial court. Accepting this explanation at face value threatens to erode the *Batson* standard in a sea of pat explanations. Uniform rejection of hunches would eliminate a valid and useful form of peremptory challenge. Cf. *J. E. B.*, 511 U. S., at 147-148 (O'Connor, J., concurring) (legitimacy of hunches in peremptory challenges). The trial court's only alternative is to attempt to use its own judgment to discern whether the claim of a hunch is valid or a pretest for discrimination. While *Batson* contemplates trial courts using their judgment and analysis of credibility, see 476 U. S., at 98, n. 21, even the most experienced trial court judge may have difficulty with this decision.

Batson's risk is that this search for objective, neutral criteria that can be explained to trial and appellate courts will distort jury selection. Being accused of intentional discrimination is at best difficult. The *Batson* inquiry "requires that [counsel] reveal and explain his motivations in court, on the record, and in the presence of [opposing] counsel . . . ," Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1419 (1987), making this issue even more difficult for the accused attorney. A too aggressive enforcement of *Batson* will deter peremptory challenges made for nondiscriminatory reasons but which counsel fears to defend in open court.

This problem is magnified by the consequences of an adverse *Batson* ruling. In addition to losing the challenge, and being left with a juror that counsel has tried to remove, the attorney is also labeled as racist or sexist. Excluding someone from jury service on racial grounds is a federal crime. See 18 U. S. C. § 243. While prosecution is highly unlikely, being found racist or sexist in court is a profound deterrent, and a serious matter. It is important to keep *Batson* claims from being made lightly in order to prevent any further erosion of the peremptory challenge.

Batson's regulation of peremptory challenges is so severe that it is now used by some litigants for reasons other than preventing discrimination. "Some prosecutors also commented that defense counsel sometimes use the [*Batson*] motions strategically, to embarrass the prosecutor or to prevent the loss of a juror biased in the defendant's favor." Montoya, The Future of the Post-*Batson* Peremptory Challenge: Voir Dire by Questionnaire and the "Blind" Peremptory, 29 U. Mich. J. L. Reform 981, 1008 (1996). Peremptory challenges are too important to justice and society to sacrifice to this use of *Batson*. *Batson*'s goal of preventing jury discrimination is important, but its procedure should not be manipulated to where its marginal cost in harm to peremptory challenges outweighs the marginal benefit of preventing discrimination. California's rule appropriately reflects this calculation.

IV. The California rule sets an appropriate balance between *Batson*'s costs and benefits.

California requires that the moving party under *Batson* v. *Kentucky*, 476 U. S. 79 (1986) make its prima facie case by proving discrimination by a preponderance of the evidence. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1306, 71 P. 3d 270, 272 (2003). This reflects an appropriate balance of the social costs and benefits of regulating peremptory challenges through the Equal Protection Clause. Requiring this level of proof helps to preserve peremptory challenges by preventing needless examination of counsel's motives for making challenges, while avoiding the insurmountable burden of proof of *Swain* v. *Alabama*, 380 U. S. 202 (1965). In addition, this approach is the most natural reading of the language of *Batson* and this Court's interpretations of that case.

California's approach to *Batson* deals with the most significant difficulty with that decision. *Batson*'s problem is that it requires courts to inquire into an attorney's motives. This subjective inquiry is foreign to most constitutional

criminal procedure. Objectivity is the general rule, such as with justification for a search or seizure, see *Whren* v. *United States*, 517 U. S. 806, 814 (1996); or whether a suspect is in custody for the purpose of *Miranda* v. *Arizona*, 384 U. S. 436 (1966). See *Berkemer* v. *McCarty*, 468 U. S. 420, 442, and n. 35 (1984). *Batson* procedure "places a spotlight on [counsel's] motives in the most immediate, dramatic, and intrusive fashion." Reiss, Prosecutorial Intent in Constitutional Criminal Procedure, 135 U. Pa. L. Rev. 1365, 1419 (1987). This inquiry is also alien to the entire idea behind peremptory challenges—that they need no justification. See *supra*, at 19-20. Unfortunately, there is no alternative to this subjective inquiry. Refusing to examine counsel's subjective intent would render *Batson* a nullity, and return to the unenforceable standard of *Swain* v. *Alabama*, 380 U. S. 202 (1965).

Batson's first stage, the prima facie case, is the logical place to weed out unnecessary claims. Since the greatest cost of *Batson* is requiring counsel to go through the unfortunate process of justifying his or her peremptory challenges, it is sensible to proceed to *Batson*'s second step only when it is necessary. If the proponent of a *Batson* motion cannot raise an inference of discrimination by a preponderance of the evidence, then counsel should not be forced to undergo the humiliation of standing accused of being a racist, nor the difficulty of explaining the inherently difficult to explain peremptory challenge.

In addition to being fair to the party making the peremptory challenge, this standard helps to limit the strategic use of peremptory challenges. As noted earlier, there are reports that parties do not use *Batson* just to combat perceived discrimination. Now *Batson* is also a tool to humiliate opposing counsel, or to keep one's opponent from using a peremptory challenge against a juror biased in one's favor. See *supra*, at 25. Statements that *Batson* challenges are now "commonplace," see *United States* v. *Annigoni*, 96 F. 3d 1132, 1150 (CA9 1996) (en banc) (Kozinski, J., dissenting), are consistent with the idea that *Batson* challenges are now made carelessly in order to gain an

advantage against the opponent. The only way to prevent abuse of *Batson* is by setting a sufficiently high barrier to *Batson* challenges. This can only be done at the first stage. If standard for a prima facie case is lowered from California's, then this abuse of *Batson* will only increase.

California's approach is also consistent with the most natural reading of *Batson* and cases interpreting its rule. If the trial court finds a prima facie case, then the opposing party must "articulate a neutral explanation related to the particular case to be tried." Saying nothing, or simply issuing a blanket denial of discriminatory intent leads to the *Batson* motion succeeding. "Nor may the prosecutor rebut the defendant's case merely by denying that he had a discriminatory motive or 'affirm[ing] [his] good faith in making individual selections." *Batson*, 476 U. S., at 98. If counsel provides a neutral explanation, then the trial court "will have the duty to determine if the defendant has established purposeful discrimination." *Ibid.*

Requiring the *Batson* proponent to make his or her case at the first step is the only way to make sense of this procedure. Since the party defending the peremptory challenge will lose the motion if it does not provide a neutral explanation, it is only fair to make the party attacking the peremptory challenge to carry its entire burden at the first stage.

This reading is consistent with decisions describing *Batson* procedure. Language in the cases interpreting *Batson* affirm that the proponent of the *Batson* motion must make his or her entire case at the first stage of the three-step inquiry.

> "First, a defendant must make a prima facie showing that a peremptory challenge has been exercised on the basis of race. Second, if that showing has been made, the prosecution must offer a race-neutral basis for striking the juror in question. Third, in light of the parties' submissions, the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El* v. *Cockrell*, 537 U. S. 322, 328-329 (2003) (citations omitted).

This Court also affirmed that once a prima facie is made, then the party making the peremptory challenge is required to provide a neutral explanation at the second step or the *Batson* motion succeeds. See *Batson*, 476 U. S., at 98. This separates the *Batson* "trial" from a standard trial. While the defending party in a trial may present no evidence and still succeed if the jury finds that the prosecution or the plaintiff did not carry its burden of proof, in *Batson* the defense carries its own burden once the prima facie case is made by the proponent.

This affirms the correctness of the California Supreme Court's conclusion that *Batson*'s prima facie case is the first of the two types of prima facie cases described in Wigmore. See *People* v. *Johnson*, 30 Cal. 4th 1302, 1315, 71 P. 3d 270, 278 (2003). Wigmore describes two uses of prima facie evidence. The first use discussed is where the term is "used as *equivalent to the notion of a presumption*, even in the strict sense." 9 Wigmore, Evidence § 2494, p. 379 (Chadbourn rev. 1981) (emphasis in original). This means that the proponent who had the burden of proving the issue

> "has not only removed by sufficient evidence the duty of producing evidence to get past the judge to the jury, but has gone further, and, either by means of a presumption or by a general mass of strong evidence, has entitled himself to a ruling that the opponent should fail if he does nothing more in the way of producing evidence." *Ibid.*

The second, very different use of prima facie "represent[s] the stage . . . where the proponent, having the first duty of producing some evidence in order to pass the judge to the jury, has fulfilled that duty, satisfied the judge, and may properly claim that the jury is allowed to consider this case." *Ibid.*

Batson's prima facie case is consistent with Wigmore's first definition. The shifting of the burden of production from the proponent to the opponent once the prima facie case is made describes *Batson*'s first and second stages. Since *Batson* has no presumption of discrimination, the prima facie case can only be

made by Wigmore's "general mass of strong evidence." That describes the proof by a preponderance of the evidence found in the California standard.

The second use of prima facie case, although more common, deals with a different type of hearing than a *Batson* proceeding. A lower standard of evidence is acceptable in this second definition in order to preserve the jury's role as the ultimate factfinder. Requiring the proponent to satisfy the judge that it had fulfilled its entire burden of proof before the case could go to the jury, usurps the jury's function. This consideration is inapplicable to *Batson* claims, because the trial court that decides whether there is a prima facie case is also the ultimate factfinder. Since there is no jury function to protect, it makes sense to require the *Batson* proponent to satisfy the burden of proving its case at the first stage.

Another aspect of the *Batson* inquiry reinforces this interpretation. In *Hernandez* v. *New York*, 500 U. S. 352 (1991), the plurality noted, "In the typical peremptory challenge inquiry, the decisive question will be whether counsel's race-neutral explanation for a peremptory challenge should be believed." *Id.*, at 365. The explanation of the peremptory challenge is the focus of the *Batson* inquiry because *Batson* begins by the proponent proving discrimination. If the proponent does not have to meet its ultimate burden at *Batson*'s first stage, then the focus on counsel's explanation for the peremptory challenge takes a very different tone. Inferences drawn from counsel's explanation at *Batson*'s second stage will supplement the prima facie case to provide proof of discrimination by a preponderance of the evidence, completing the proponent's case. *Batson*'s requirement that counsel must explain a peremptory challenge is already onerous. Using that compelled explanation as evidence against the party making the peremptory challenge is unacceptable, particularly since *Batson* now covers civil litigants and criminal defendants.

"By preserving the peremptory challenge, and superimposing an antidiscrimination rule, the Court has struck a sensible

and workable balance . . . . Because such a modified peremptory challenge serves important functions, it is worth preserving," Underwood, Ending Race Discrimination in Jury Selection: Whose Right is it Anyway?, 92 Colum. L. Rev. 725, 761 (1992). The interests served by *Batson* are not advanced by turning it into a fishing expedition for proof of discrimination or a means of preventing nondiscriminatory peremptory challenges based upon hunches or similarly unarticulable justifications. *Batson*'s first stage is the only realistic means for controlling this potentially intrusive inquiry. Requiring the party attacking the peremptory challenge to make its case before requiring opposing counsel to explain the challenge preserves peremptory challenges without sacrificing equal protection. It is fair, efficient, and consistent with this Court's decisions. Neither society nor equal protection require anything more.

CONCLUSION

The decision of the California Supreme Court should be affirmed.

February, 2004

Respectfully submitted,

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